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Why Expansion of the FCC's Public Interest Regulatory Regime is Unwise, Unneeded, Unconstitutional, and Unenforceable

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I. Introduction

Thank you for inviting me here today for this FCC workshop on "Serving the Public Interest in the Digital Era." I have been asked to discuss "the impact of media convergence and the emergence of the Internet, mobile technologies, and digital media on FCC media policy" on the FCC's "public interest" regulatory regime.

Adam Thierer is President of The Progress & Freedom Foundation. The views expressed in this report are his own and not necessarily the views of the PFF board, fellows or staff.

In my remarks, I will outline both the normative and practical cases against the expansion of "public interest" notions and corresponding regulatory requirements. I will argue that such considerations counsel that the Commission exercise extreme caution as it looks to revise regulations that govern America's media marketplace.

II. The Normative Case against Expansion of Public Interest Regulation

A. The Inherent Ambiguity of "the Public Interest" Notion

The normative case against expansion of public interest regulation begins with the fact that this notion has always been haunted by an inherent ambiguity that is fundamentally at odds with America's First Amendment tradition. Indeed, while public interest regulation has been considered the cornerstone of communications and media policy since the 1930s, at no time during these seven decades has the term been adequately defined.

Former FCC Commissioner Glen Robinson has argued that the public interest standard "is vague to the point of vacuousness, providing neither guidance nor constraint on the agency's action." And Nobel Prize-winning economist Ronald Coase argued 50 years ago that "The phrase... lacks any definite meaning. Furthermore, the many inconsistencies in commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation."

And that is still true today. Simply put, the public interest *standard* is not really a "standard" at all since it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.

B. None Dare Call it Elitism

Still, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of media toward a nobler end. At times, their rhetoric takes on a fairy-tale quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, again, all the while deftly evading any attempt to define the term.

Federal Communications Commission, *The Future of Media & Information Needs of Communities: Serving the Public Interest in the Digital Era, Media Advisory*, Feb. 12, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296254A1.pdf

Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 14 (Max D. Paglin ed., 1989). Likewise, Lawrence J. White has noted that, "The 'public interest' is a vague, ill-defined concept. Under the 'public interest' banner the Congress and the FCC have established far too many protectionist, anticompetitive, anti-innovative, inflexible, output-limiting regulatory regimes and have unnecessarily infringed on the First Amendment rights of broadcasters." *See* Lawrence J. White, *Spectrum for Sale*, THE MILKEN INST. REV. (June 2001) at 38. *See also* William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 Emory L. J. 715, 716 (1989).

Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 8–9 (1959). Even supporters of broadcast regulation such as Paul Taylor and Norman Ornstein admit that, "neither in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest." Paul Taylor & Norman Ornstein, New America Foundation, *A Broadcast Spectrum Fee for Campaign Finance Reform*, Spectrum Series Working Paper No. 4, (2002) at 6.

But the fundamental problem here is that public interest proponents assume that *their* values or objectives—which, in their opinion, are consistent with the needs and desires of the public—should ultimately triumph within the public policy arena. Simply stated, what motivates much public interest regulation is a simple desire by some here in Washington to tell the American people what's best for them.

Worse yet, how the term has been interpreted and applied by the FCC has often depended on the ideological disposition of whatever party is in charge at the time. As Ford Rowan, author of *Broadcast Fairness*, once noted: "Many liberals want regulation to make broadcasting do wonderful things; many conservatives want regulation to restrain broadcasting from doing terrible things." Consequently, during periods of liberal rule, the "public interest" has been seen as a method of politically engineering more "educational" and "community-based" programming. By contrast, in the hands of conservative appointees, the public interest has been seen as an instrument to curb "indecent" speech.

Few have dared to call this elitism—but I will.⁵ What else should we call it when a five unelected officials here at the FCC sit in judgment of acceptable media content and dictate media marketplace outcomes? The viewing and listening public, however, has a broad array of interests and desires that cannot be easily gauged by this agency. As media scholar Benjamin Compaine has rightly noted, "[i]n democracies, there is no universal 'public interest.' Rather there are numerous and changing 'interested publics.'"

Perhaps what some are afraid to ask is this: Does the public really want to watch what some policymakers and regulatory advocates consider to be more "culturally enriching" or "civic-minded" content, or would they rather tune into something else? Given the choice, many viewers will opt for what many public interest regulatory supporters would consider to be "low-brow" offerings over the programming that policymakers feel the masses should be consuming. Public interest supporters may bemoan the lack of civic spirit, or claim that this represents the end of our culture as we know it, but these are voluntary choices made by the citizenry that must be respected by government officials. In particular, government should not censor Americans' choice of content through open-ended public interest regulatory rationales.⁷

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Ford Rowan, Broadcast Fairness (Longham, 1984), p. 39.

See Adam Thierer & Berin Szoka, The Progress & Freedom Foundation, What Unites Advocates of Speech Controls & Privacy Regulation?, Progress on Point 16.19, Aug. 11, 2009, www.pff.org/issues-pubs/pops/2009/pop16.19-unites-speech-and-privacy-reg-advocates.pdf. On occasion, even public interest regulatory advocates have admitted this. "One of the dangers in evaluating the media in a public interest framework is that it can easily take on an elitist tone." David Croteau and William Hoynes, The Business of Media: Corporate Media and the Public Interest (2001) at 151.

Benjamin M. Compaine, *The Myths of Encroaching Global Media Ownership*, OPEN DEMOCRACY.NET, Nov. 6, 2001, at 5, www.opendemocracy.net/content/articles/PDF/87.pdf

See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, J. L. & ECON. 15, 19 (1967) ("The mandate to grant licenses that serve the public [interest]... does not constitute the FCC the moral proctor of the public or the den mother of the audience.")

C. There's More "Public Internet" Content Than Ever Before, But You Can't Force Citizens to Consume It

Generally speaking, however, the media marketplace traditionally *has* reflected what the public *on average* really wants to see and hear. And that's even truer today. Viewers and listeners are being offered a stunning array of diverse media inputs and options. Just because the American people sometimes make choices that policymakers find distasteful, it does *not* mean that citizens don't have good choices at their disposal.

For example, we are blessed to be living in the golden age of children's video programming.⁸ As I have documented in my ongoing PFF special report on *Parental Controls & Online Child Protection*⁹ and in other filings to the Commission,¹⁰ there's never been more educational and enriching kids programming available to families than there is today. Similarly, consider the stunning diversity of programming available thanks to the 500-plus channel universe of multichannel video options now at our disposal.¹¹ Almost every conceivable interest or hobby is now covered by a video network.¹²

And is there really any shortage political programming or "civic-minded" content from which to choose? C-SPAN alone covers more activity in the course of a week than most of us probably came into contact with in our entire lives just 30 years ago. Consider these data points.¹³ In the 2009 calendar year, C-SPAN provided the following amount of first run programming across their three channels:

Adam Thierer, The Progress & Freedom Foundation, *We Are Living in the Golden Age of Children's Programming*, Progress Snapshot 5.6, July 2009, www.pff.org/issues-pubs/ps/2009/pdf/ps5.6-childrens-television-golden-age.pdf.

Adam Thierer, The Progress & Freedom Foundation, *Parental Controls and Online Child Protection: A Survey of Tools and Methods*, Version 4.0 (2008) ("*PFF Parental Controls Report*"), www.pff.org/parentalcontrols.

Comments of The Progress & Freedom Foundation and the Electronic Frontier Foundation In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, Federal Communications Commission, MB Docket No. 09-194, Feb 24, 2010, www.pff.org/issues-pubs/filings/2010/2010-02-24-PFF-EFF_Response_to_FCC_Empowering_Parents_Protecting_Children_NOI_MB_09-194.pdf; Adam Thierer, The Progress & Freedom Foundation, Comments in the Matter of Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, Federal Communications Commission, MB Docket No. 09-26, April 15, 2009, www.pff.org/issues-pubs/filings/2009/041509-%5BFCC-FILING%5D-Adam-Thierer-PFF-re-FCC-Child-Safe-Viewing-Act-NOI-%28MB-09-26%29.pdf.

The number of channels available on multichannel video distribution platforms skyrocketed from just 70 in 1990 to 565 in 2006, the last year for which the FCC has released data. Federal Communications Commission, *Thirteenth Annual Video Competition Report*, MB Docket No. 06-189, Nov. 27, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf.

For an up-to-date list, see National Cable & Telecommunications Association, Cable Networks, www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907, or Wikipedia, List of United States Cable and Satellite Television Networks, http://en.wikipedia.org/wiki/List of United States cable and satellite television networks.

All C-SPAN data confirmed by Peter Kiley, Vice President, C-SPAN Networks. *Also see: Marking 30 Years. Covering Washington Like No Other,* www.c-span.org/30Years/default.aspx.

- 8,438 overall hours of programming;
- 2,709 hours of House & Senate floor activity; and,
- 1,222 hours of House & Senate committee hearings.

Moreover, C-SPAN recently created the C-SPAN Video Library, which archives 23 years worth (1987-on) of fully searchable (and free) video content, including:

- 161,000 overall hours of programming;
- 56,600 hours of House & Senate floor activity; and,
- 20,152 of House & Senate committee hearings.

Importantly, many people fail to realize that C-SPAN is a private, non-profit company that is provided as a public service by cable industry contributions. It receives no government or taxpayer contributions. From 1979-2009, total license fees paid by cable & satellite companies to support C-SPAN totaled \$922 million.

And let's not forget about what the Internet has made available to us. It has given us unprecedented access to public affairs information—local, state, national, and international.

But, again, you can't make people watch, listen, or read if they don't want to. "Today, the scarce resource is attention, not programming," notes Ellen P. Goodman of the Rutgers-Camden School of Law. "Given the proliferation of consumer filtering and choice, these kinds of interventions are of questionable efficacy. Consumers equipped with digital selection and filtering tools are likely to avoid content they do not demand no matter what the regulatory efforts to force exposure." ¹⁵

Absent truly repressive measures to limit choice or alter consumer media consumption patterns, it will be impossible for policymakers to force the masses to pay attention to what they want them to see or hear in an age of abundant media content and unrestricted choice. "[R]egulation cannot, in a liberal democracy, force viewers to consumer media products they do not think they want in the name of the public interest," argues Goodman. (This dilemma creates additional practical problems for proposals to expand public interest regulation, which will be discussed in Sec. II below.)

www.c-spanvideo.org/videoLibrary

Ellen P. Goodman, "Proactive Media Policy in an Age of Content Abundance," in Philip M. Napoli, ed., *Media Diversity and Localism: Meaning and Metrics* (2007) at 370, 374. And there is no reason to believe this situation has ever been different or will ever change. Writing in 1922, famed journalist Walter Lippmann noted that, "it is possible to make a rough estimate only of the amount of attention people give each day to informing themselves about public affairs," but "the time each day is small when any of us is directly exposed to information from our unseen environment." Walter Lippmann, *Public Opinion* (1922), p. 53, 57.

¹⁶ *Id.*, at 374.

D. Returning to First Principles

Yet now we face the prospect of this arbitrary regulatory regime being expanding to cover more platforms and speech.¹⁷ But, instead of first looking to expand regulation, we should use this as an opportunity to return to first principles—especially in light of the dubious constitutionality of the FCC's existing public interest regulatory regime.¹⁸

We should begin by recalling that, from the time of the republic's founding, public interest regulation has *never* been applied to newspapers, magazines, pamphlets, or books. Instead, the First Amendment has reigned supreme.¹⁹ And when policymakers attempted to apply such public interest obligations to print media, those edicts were ruled flatly unconstitutional.²⁰

The characteristics of broadcast radio and television, however, were considered sufficiently unique to justify a different regulatory approach and second-class citizenship status in terms of First Amendment rights. Scarcity, of course, was the lynchpin of the regulatory regime imposed on the broadcast industry, and it yielded calls for public interest regulation of the medium. But whatever one thinks of the scarcity rationale for differential treatment of broadcasting—and, personally, I don't believe it was ever a legitimate excuse for diminished First Amendment treatment—that era of scarcity is clearly over.²¹ We now live in an age of information abundance—even information overload.²² We have more media options and diversity at our disposal today than ever before, and generally at falling prices.²³ And yet, at the Commission, it continues to be business as usual.

The courts, however, have acknowledged that the situation on the ground has changed, and changed radically. When policymakers have sought to expand broadcast-like regulatory requirements to newer media platforms in recent years, the Courts have pushed back. That has

Even FCC officials have acknowledged this. See John W. Berresford, Federal Communications Commission, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed, FCC Media Bureau Staff Research Paper No. 2005-2, (March 2005) www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf. Berresford refers to the scarcity rationale as "outmoded," "based on

released/scarcity030005.pdf. Berresford refers to the scarcity rationale as "outmoded," "based on fundamental misunderstandings of physics and economics," and "no longer valid."

Among the expanded public interest responsibilities regulatory advocates promote: Controls on speech (indecent or "excessively violent" content); expanding coverage of political campaigns, debates and developments; free (or lower-cost) campaign ad time; expanded "educational" or cultural programming (especially aimed at children); and expanded coverage of community affairs and public service announcements.

See Randolph J. May, The Public Interest Standard: Is It Too Indeterminate to Be Constitutional? 53 Fed. Comm. L. Jour. (May 2001) at 427-68, www.law.indiana.edu/fclj/pubs/v53/no3/may.pdf.

Jonathan Emord, *Freedom, Technology and the First Amendment* (1991).

²⁰ *Miami Herald v. Tornillo*, 418 U.S. 241(1974).

See Adam Thierer and Grant Eskelsen, The Progress & Freedom Foundation, Media Metrics: The True State of the Modern Media Marketplace (Summer 2008), www.pff.org/mediametrics; Adam Thierer, The Media Cornucopia, 17 City Journal 2 (Spring 2007) at 84-89, www.city-journal.org/html/17 2 media.html.

See Benjamin M. Compaine, The Media Monopoly Myth: How New Competition is Expanding Our Sources of Information and Entertainment, New Millennium Research Council (2005)
www.newmillenniumresearch.org/archive/Final_Compaine_Paper_050205.pdf.

particularly been the case for the Internet²⁴ and video game content.²⁵ The jurisprudential Twilight Zone will live in today—in which we classify services and determine free speech rights based on technical characteristics or functional features—makes no sense and can't last for much longer for reasons discussed next.²⁶

III. The Practical Case against Expansion of Public Interest Regulation

Let's look beyond these normative concerns and instead focus on the *practical* considerations associated with any effort to expand the horizons of public interest regulation.

A. The Scale & Volume Problem

As the title of this particular panel quite rightly noted, we now live in an age of media and technological convergence.²⁷ All bits are coming together.²⁸ Because convergence is now upon us, media can be distributed instantaneously across numerous platforms. Thus, a regulatory attack on one type of media outlet or technology might necessitate an attack on many other media outlets if it has any hope of being effective.

But how will this work? If we are to achieve regulatory parity in an age of convergence, we must come to grips with the sheer scale of the task at hand. The modern mediasphere is massive—and growing rapidly. Consider some statistics about online media activity:

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Reno v. American Civil Liberties Union, 521 US 844, 874 (1997); American Civil Liberties Union v. Gonzales, 478
 F.Supp.2d 775, 795 (E.D.Pa. 2007).

See, e.g., Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 965-967 (9th Cir. 2009); Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006); Interactive Digital Software Association, et. al. v. St. Louis County, et. al., 329 F.3d 954 (8 Cir. 2003); American Amusement Machine Association, et al. v. Kendrick, et al., 244 F.3d 572 (7th Cir. 2001); Entertainment Software Ass'n v. Granholm, 426 F Supp 2d 646 (E.D. Mich. 2006); Video Software Dealers Association, et. al. v. Maleng, et. al., 325 F. Supp.2d 1180 (W.D. Wa. 2004). See generally Adam Thierer, The Progress & Freedom Foundation, Fact and Fiction in the Debate Over Video Game Regulation, Progress on Point 13.7, March 2006, at 13-18 www.pff.org/issues-pubs/pops/pop13.7videogames.pdf (discussing cases striking down state video game laws); Henry Cohen, Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or Strong Language, Congressional Research Service, U.S. Library of Congress (Jan. 12, 2006), http://digital.library.unt.edu/ark:/67531/metacrs9144/m1/1/high_res_d/.

Adam Thierer, Why Regulate Broadcasting: Toward a Consistent First Amendment Standard for the Information Age, Catholic University Law School, 15 CommLaw Conspectus (Summer 2007) at 431-482; http://commlaw.cua.edu/articles/v15/15_2/Thierer.pdf. Randy May as referred to these artificial distinctions as "techno-functional constructs." Randolph J. May, Charting a New Constitutional Jurisprudence for the Digital Age, Engage (Oct. 2008) at 109.

Henry Jenkins, founder and director of the MIT Comparative Media Studies Program and author of Convergence Culture: Where Old and New Media Collide, defines convergence as "the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want." Henry Jenkins, Convergence Culture: Where Old and New Media Collide (2006) at 2.

Nicholas Negroponte, Being Digital (1995).

- 1.73 billion Internet users worldwide as of Sept 2009; an 18% increase from the previous year.²⁹
- 81.8 million .COM **domain names** at the end of 2009; 12.3 million .NET names & 7.8 million .ORG names.³⁰
- 234 million **websites** as of Dec 2009; 47 million were added in 2009.³¹ In 2006, Internet users in the United States viewed an average of 120.5 Web pages each day.³²
- There are roughly 26 million **blogs** on the Internet³³ and even back in 2007, there were over 1.5 million new blog posts every day (17 posts per second).³⁴
- In December 2009, 86% of the total U.S. online population viewed video content.³⁵ The average online viewer watched 187 videos (up 95 percent from the previous year), while the average video length viewed grew from 3.2 to 4.1 minutes.³⁶ The majority of online video viewing (52%) occurred at video sites ranked outside of the top 25, suggesting the increased fragmentation of online video and the emergence of sites in the "long tail."³⁷
- **YouTube** reports that 20 hours of video are uploaded to the site every minute, ³⁸ and 1 billion videos are served up daily by YouTube, or 12.2 billion videos viewed per month. ³⁹
- For video hosting site **Hulu**, as of Nov 2009, 924 million videos were viewed per month in the U.S.⁴⁰
- Developers have created over 140,000 apps for the Apple iPhone and iPod and iPad and made them available in the Apple App Store.⁴¹ Customers in 77 countries can choose apps in 20 categories, and users have downloaded over three billion apps since its

Royal Pingdom, *Internet 2009 in Numbers*, Jan. 22, 2010, http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers.

³⁰ *Id.*

³¹ *Id.*

Gavin O'Malley, Comcast Taps Hispanic Web Portal, MediaPost News, Online Media Daily, March 8, 2006, www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=40714

Royal Pingdom, supra 29.

David Sifry, The State of the Live Web, April 2007, www.sifry.com/alerts/archives/000493.html

comScore, The 2009 U.S. Digital Year in Review - A Recap of the Year in Digital Marketing 10, Feb. 2010, http://www.comscore.com/Press_Events/Press_Releases/2010/2/comScore_Releases_2009_U.S._Digital_Year_in_Review.

³⁶ *Id*.

³⁷ *Id*. at 12.

Ryan Junee, Zoinks! 20 Hours of Video Uploaded Every Minute!, Broadcasting Ourselves: The Official YouTube Blog, May 20, 2009, http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html

Royal Pingdom, supra 29.

⁴⁰ Royal Pingdom, supra 29.

⁴¹ Apple, 140,000 apps at your fingertips. From day one., www.apple.com/ipad/app-store.

inception in July 2008.⁴² Apple's iTunes Store has a catalog of 12 million songs, over 55,000 TV episodes, and 8,500 movies. It has sold more than 10 billion songs.⁴³

- Social networking giant Facebook reports that each month, its 400+ million users upload more than 3 billion photos, and create over 3.5 million events. More than 3 billion pieces of content (web links, news stories, blog posts, notes, photos, etc.) are shared each week. There are also more than 3 million active Pages on the site.⁴⁴
- There are 10 million edits made to Wikipedia every seven weeks.
- Twitter users send out 50 million tweets per day, an average of 600 tweets per second. 46
- 4 billion photos hosted by **Flickr** as of Oct 2009.⁴⁷

Even in "traditional" media sectors, the scale and volume problem is formidable: 48

- 565 cable TV channels⁴⁹
- over 2,200 broadcast TV stations⁵⁰
- over 13,000 broadcast radio stations⁵¹
- over 20,000 magazines⁵²
- over 276,000 books⁵³

Press Release, Apple, Apple's App Store Downloads Top Three Billion (Jan. 5, 2010), www.apple.com/pr/library/2010/01/05appstore.html.

Press Release, Apple, *iTunes Store Tops 10 Billion Songs Sold* (Feb. 25, 2010), www.apple.com/pr/library/2010/02/25itunes.html.

Facebook, Statistics, www.facebook.com/press/info.php?statistics (last accessed Mar. 2, 2010).

Katalaveno, Edit growth measured in time between every 10,000,000th edit, en.wikipedia.org/wiki/User:Katalaveno/TBE (last accessed Mar. 2, 2010).

Twitter Blog, *Measuring Tweets*, Feb. 22, 2010, http://blog.twitter.com/2010/02/measuring-tweets.html.

⁴⁷ Royal Pingdom, supra 29.

Statistics derived from various sources, but all can be found in Adam Thierer and Grant Eskelsen, The Progress & Freedom Foundation, *Media Metrics: The True State of the Modern Media Marketplace* (Summer 2008), www.pff.org/mediametrics.

Federal Communications Commission, *Thirteenth Annual Video Competition Report*, MB Docket No. 06-189, Nov. 27, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf.

⁵⁰ Central Intelligence Agency, *The World Fact Book*, United States, www.cia.gov/library/publications/the-world-factbook/geos/us.html (data is from 2006).

⁵¹ *Id*

Magazine Publishers of America, *Magazines: The Medium of Action, A Comprehensive Guide and Handbook 2009/10*, at 8, www.magazine.org/ASSETS/088C8564EB9E4E978A69B183881AEF58/MPA-Handbook-2009.pdf.

Bowker, *Bowker Reports U.S. Book Production Flat in 2007*, May 28, 2008, www.bowker.com/index.php/press-releases/526.

In sum, the mediasphere is bigger than ever and it begs the question how the FCC plans to wrap its public interest regulatory tentacles around all of it if analog era regulations are to cover digital era content, platforms, and technologies.

B. The Definitional Problem: Who's Covered (or Subsidized?)

Another intractable problem associated with expansion of public interest regulation will arise once policymakers are forced to define who or what counts as a "media entity" or a "journalist" in today's wide-open media world. And this will be a problem whether public officials are regulating media entities or subsidizing them.

For example, will bloggers be regulated or, conversely, eligible for public media subsidies? Will foreign-owned news entities be regulated or be eligible for support? What's the public interest standard that applies to MySpace or Facebook? Are YouTube, Hulu, and Vimeo, and Joost "just like TV stations" and, therefore, regulated like one? There may well be rational ways to make cuts along these lines, but they could raise constitutional questions. Government preferences among speakers or classes of speakers are prior restraints, constitutional sins of the highest order.

Further, it would be just these sorts of choices that would open the door to the most abusive government intrusion into the production of journalism. It is not hard to imagine that government regulators, even with the best of intentions and acting in the utmost good faith, would, perhaps unconsciously, favor speakers and classes of speakers to whom they felt the closest affinity. And, because Administrations come and go, as do members of Congress, no particular class of speakers would ever be truly safe — no story would be reported without at least a glance by the author over her shoulder to make sure that she had not offended the "wrong" person. This is not an approach consistent with a free press reporting to a free people.

C. Expanded Regulation Will Kneecap Media Providers As They Are Struggling to Reinvent Themselves

Meanwhile, this inquiry comes at a time when many traditional media providers are fighting for their very existence. Audiences are fragmenting. Advertisers are fleeing. Revenues are shrinking. And yet, again, here we are toying with the idea of *expanding* regulatory burdens while the media marketplace is experiencing unprecedented upheaval and gut-wrenching creative destruction.

And if the FCC's intends to simply continue to impose public interest regulations on the narrow set of media operations they currently control—broadcast television and radio—that's tantamount to the FCC signing a death warrant for those media operators. But, as noted below, any proposal to "spread the pain around" by burdening everyone equally is a recipe for even greater economic catastrophe, and it wouldn't likely pass constitutional muster in the courts anyway.

This all begs the question: Do traditional media providers really have too much power, or do they actually have too little. Indeed, the viability of traditional media operators is increasingly in doubt since they lack pricing power and the ability to control when, where, and how their content is delivered and consumed. They no longer have protected geographic markets or "protectable scarcity." Meanwhile, advertising—the traditional lifeblood of the media

sector⁵⁴—is increasingly being subjected to new scrutiny and regulation here in Washington.⁵⁵ And copyright infringement has also made monetization more challenging and placed strains on many operators. Regardless, with traditional media operators in such serious trouble, now certainly isn't the time to impose new rules and red tape that could hamstring their ability to respond to new competitive pressures.

Perhaps the most destructive set of ideas floating around today are those that would essentially burn the village in order to save it. For example, some regulatory advocates have toyed with ideas like "public interest vouchers," broadcast spectrum taxes, expanded ownership restrictions or forced media divestiture plans, or even taxes on commercial advertising, consumer electronics, cell phone providers, and ISPs. In each case, the cure would be worse than the disease that ails the body. We're not going to get a more diverse

[&]quot;Advertising is the mother's milk of all the mass media," *Wall Street Journal* technology columnist Walt Mossberg has noted. Walter Mossberg, *Now You See 'Em...*, SmartMoney.com, June 15, 2000, available at http://web.archive.org/web/20061124235126/http://www.smartmoney.com/mossberg/index.cfm?story=200 00615; And Harold L. Vogel, author of *Entertainment Industry Economics*, the definitive textbook for media market analysts, has noted, "Advertising is the key common ingredient in the tactics and strategies of all entertainment and media company business models. Indeed, it might further be said that advertising has substantively subsidized the production and delivery of news and entertainment throughout the last century." Harold L. Vogel, *Entertainment Industry Economics* (Cambridge University Press, 7th Edition, 2007) at 46.

Adam Thierer & Berin Szoka, *The Hidden Benefactor: How Advertising Informs, Educates & Benefits Consumers*, Feb. 22, 2010, www.pff.org/issues-pubs/ps/2010/ps6.5-the-hidden-benefactor.html; Berin Szoka & Adam Thierer, *Targeted Online Advertising: What's the Harm & Where Are We Heading?*, Progress on Point 16.2, April 2009, www.pff.org/issues-pubs/pops/2009/pop16.2targetonlinead.pdf; Berin Szoka & Adam Thierer, *Behavioral Advertising Industry Practices Hearing: Some Issues that Need to be Discussed*, PFF Blog, June 18, 2009, http://blog.pff.org/archives/2009/06/behavioral advertising industry practices hearing.html

For example, Robert McChesney and John Nichols advocate a "Citizenship News Voucher" that would give every American adult a \$200 voucher to donate money to the non-profit news medium of their choice. Of course, a number of restrictions would apply to eligible entities, including a ban on accepting advertising as a condition of receiving support from the program. Robert W. McChesney & John Nichols, *The Death and Life of American Journalism* (2010) at 201-6.

For a recent debate on the question of broadcast spectrum taxes, see: Resolved, Broadcasters Should be Charged a Spectrum Fee to Finance Programming in the Public Interest, Pro: Norm Ornstein, Con: Adam Thierer, in Richard J. Ellis and Michael Nelson, Debating Reform: Conflicting Perspectives on How to Fix the American Political System (2010) at 53-69. Also see McChesney & Nichols, supra 56 at 209-10.

For example, Free Press calls for "government incentives to encourage local ownership and media divestiture." They want to prevent private media operators from attaining greater scale at the exact time they probably need to do so. Instead, they would subsidize those media entities who went non-commercial and disaggregated to become more atomistic. Comments of Free Press In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? Federal Trade Commission, Project No. P091200, Nov. 6, 2009, at 21, www.ftc.gov/os/comments/newsmediaworkshop/544505-00027.pdf.

Free Press advocates channeling more money to public media by affixing "a small tax" on private commercial advertising. *Comments of Free Press In the Matter of News Media Workshops: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age*? Federal Trade Commission, Project No. P091200, Nov. 6, 2009, at 18, www.ftc.gov/os/comments/newsmediaworkshop/544505-00027.pdf.

McChesney & Nichols, *supra* 56 at 210-11. They advocate a 5% tax on consumer electronics and a 3% tax on monthly cell phone bills to channel money into a massive new "public works" program for the press.

media marketplace in this country by forcing private media providers to fund their non-commercial or public-subsidized competitors. While some of these proposals are well-intentioned and aimed at addressing perceived deficiencies in the market for "public interest" content, there are better ways for policymakers to achieve that goal.

IV. Using Existing Public Platforms to Promote Preferred Content Through a "Public Interest Portal"

Most obviously, support for the Corporation for Public Broadcasting (CPB) could be expanded. However, that should be achieved without skimming funds off of commercial advertising budgets or through "fees" on private media operators. Enhanced support for CPB and non-commercial media in general should be derived from general treasury funds, not special levies on commercial media operators.

If the FCC believes something more must be done to create—or drive citizens to—"public interest" or civic-minded content, the best approach would be for the agency to work with other federal and state entities and leverage existing government platforms and resources to accomplish this task.

Consider how federal agencies are already doing so in an effort to promote Internet safety and security. A dozen federal agencies and several private child safety organizations have collaborated⁶¹ to create the OnGuardOnline.gov website, which "provides practical tips from the federal government and the technology industry to help you be on guard against Internet fraud, secure your computer, and protect your personal information." Among other things, the effort includes a "Stop-Think-Click" promotion that recommends "Seven Practices for Safer Computing." In October 2009, OnGuardOnline also released a new online safety resource called *Net Cetera: Chatting with Kids about Being Online.* This 54-page document, which is being widely distributed by the government (both online and offline), is an outstanding resource for parents and kids.

In a similar vein, the FCC could work with several other agencies to create a massive "Public Interest Portal" that aggregates and promotes the sort of the public interest programming and content that policymakers hope will gain more widespread distribution—whether produced by traditional programmers, niche professionals, or amateurs. The collaborating agencies might even be able to create a downloadable widget or toolbar for use on any web browser that could enable citizens to instantaneously access a wide variety of public interest content. Many organizations already offer similar portals for children's content. (Examples include: KidZui,⁶⁴ Glubble,⁶⁵ Browser Buddy,⁶⁶ KidRocket,⁶⁷ KIDO'Z,⁶⁸ Noodle Net,⁶⁹ Hoopah Kidview Computer

65 www.glubble.com

⁶¹ www.onguardonline.gov/about-us/overview.aspx

www.onguardonline.gov/default.aspx

www.onguardonline.gov/pdf/tec04.pdf

www.kidzui.com

⁶⁶ www.buddybrowser.com

Explorer⁷⁰ and Peanut Butter PC.⁷¹) There's no reason that model couldn't be significantly expanded by the FCC and other government agencies if they put their resources behind it.

The success of this approach, of course, is by no means guaranteed since, as noted above, it is impossible to force a free people to consume content they do not demand. Nonetheless, it would allow the government to at least accomplish the objective it has long sought to achieve through affirmative regulation of commercial media providers: increasing the availability and practical accessibility of public interest programming. Moreover, this approach would have the advantage of not raising serious constitutional objections or burdening commercial media operators with onerous new regulatory requirements or fees. If, however, policymakers reject this approach on the grounds that citizens would still "tune in" to other types of programming first, it would confirm the fundamental elitism that some of us have long suspected truly animates most "public interest" regulatory efforts.

V. Conclusion: Regulate Up or Deregulate Down?

In light of the considerations addressed above, we must ask: To achieve regulatory parity, should we regulate up or deregulate down? To the extent that technological convergence leads to policy convergence, it should be done in the latter direction. In a world in which scarcity has been overthrown by abundance, we should strike the balance in favor of greater media freedom and stronger First Amendment protections for all speech *however it is delivered*.⁷²

It is vital that the outmoded public interest rationales undergirding the broadcast regulatory regime be discarded, not only to spare broadcasters from more unfair, asymmetrical regulatory restrictions, but also to ensure that this contorted vision of the First Amendment is not extended to other media platforms.⁷³ While some policymakers and media critics propose extending the broadcast regulatory regime to cover new media outlets and digital technologies,⁷⁴ if America is to have a consistent First Amendment in the Information Age, such

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67 http://kidrocket.org
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⁶⁸ www.kidoz.net

⁶⁹ www.noodlenet.com

www.hoopah.com

www.peanutbuttersoftware.com

⁷² Brian C. Anderson & Adam D. Thierer, *A Manifesto for Media Freedom* (2008).

See Adam Thierer, Why Regulate Broadcasting: Toward a Consistent First Amendment Standard for the Information Age, Catholic University Law School, 15 CommLaw Conspectus (Summer 2007) at 431-482; http://commlaw.cua.edu/articles/v15/15_2/Thierer.pdf; Adam Thierer, FCC v. Fox and the Future of the First Amendment in the Information Age, Engage (Feb. 2009) www.fed-soc.org/doclib/20090216 ThiererEngage101.pdf.

See Adam Thierer, The Progress & Freedom Foundation, Thinking Seriously about Cable and Satellite Censorship: An Informal Analysis of S. 616, The Rockefeller-Hutchison Bill (2005) www.pff.org/issues-pubs/pops/pop12.6CableCensorship.pdf; Robert Corn-Revere, The Progress & Freedom Foundation, Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio? (2005) www.pff.org/issues-pubs/pops/pop12.8indecency.pdf.

efforts should be halted and the public interest regulatory regime should be relegated to the ash heap of history.

There are better ways for the Commission and Congress to accomplish "public interest" goals other than by regulating as if it's still 1934.